IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1713

PILGRIM EQUIPMENT COMPANY, INC., ET AL,
Petitioners,

v.

W. J. USERY, SECRETARY OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, Pilgrim Equipment Company, Inc., et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 3, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, infra, 1A to 14A. The decision of the District Court for the Southern District of Texas appears in the Appendix, infra, 15A to 32A.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 3, 1976. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the definition of "employee" under the Fair Labor Standards Act (FLSA)[1] as applied by the courts of appeal differs from that established by this Court's 1947 Trilogy.[2]

2. Whether the Congressional intent in enacting the FLSA—protection of workers from oppressive practices of employers[3]—has been so misconstrued that no American worker can be an independent contractor.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29: § 201, et seq.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because a question arises under a law relating to interstate commerce, the FLSA.

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1. 29 U.S.C. § 201 et seq

2. *Bartels v. Birmingham*, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *United States v. Silk*, 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947). These three cases have been so often cited as authority in interpretation of the FLSA that they are collectively referred to as "the trilogy."

3. 29 U.S.C. 202.

The Secretary of Labor (Plaintiff) brought this suit to enjoin defendants from violating minimum wage and overtime provisions of the FLSA. Plaintiff contends that certain individuals are defendants' employees. Defendants assert that the individuals are independent contractors, not "employees," under the FLSA and, therefore, not subject to its requirements. The individuals involved contend they are independent contractors and not employees of the defendants. Following the presentation of testimony and documentary evidence, the district court made 28 separate findings of fact, from which it concluded that when applied to the criteria established by this Court in the trilogy,[4] the individuals were independent contractors and not employees for purposes of the FLSA. Judgment was entered for the defendants. The court of appeals held that the legal conclusion reached by the trial court from its factual findings was in error and reversed the case.

Since the trial court's fact findings were accepted by the court of appeals, the following facts are summarized from the findings of fact of the trial court (Appendix, infra, 16A to 30A).

Each of the Pilgrim companies operates at least one laundry and drycleaning plant and a number of pickup stations. In addition, certain individuals, referred to by the trial court as contract operators, operate stores where they receive clothes, mark them for identification, prepare them for processing and send them to a laundry and drycleaning plant operated by one of the Pilgrim companies. After processing, the clothing is returned to the store for delivery to the customer.

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4. Note, 2, Supra.

Each contract operator signed a "Lease Agreement and Contract" with a Pilgrim company which governs the relationship between the operator and the particular Pilgrim company. Each lease agreement is effective for a one year term and is automatically extended unless either party chooses to terminate. The relationship of the parties under each lease agreement is denominated as that of owner and independent contractor. Each lease agreement provides for the owner to furnish a store and equipment and requires the owner to carry liability insurance on the premises, machinery, equipment and fixtures.

Under the lease agreement each contract operator agrees to deliver all clothing and other garments exclusively to the contracting company for laundering and cleaning. The contract operator agrees to pay a stated amount to the contracting company each day for laundering and cleaning. At the end of each week the contracting company agrees to bill the contract operator for the total amount of work done for that store, and the contract operator agrees to remit that amount less a stated percentage which the operator retains from the gross receipts of the business. Each operator agrees to hire his or her own employees and assumes all responsibility for obtaining and administering workmen's compensation insurance, social security and Texas unemployment compensation taxes for himself and his employees. The contract operator may set his own hours of operation for his store. He sets his own working hours and those of his employees. The contract operator is free from the control of the contracting company as to the performance of the contract. Any credit extended to the public by the contract operator is at his sole risk. The contract operator agrees to maintain all property and fixtures and keep the premises in good repair and to comply with all municipal ordinances.

Most contract operators have had prior experience as employees of one of the Pilgrim companies. Becoming a contract operator is regarded as a coveted opportunity by such employees, and there are numerous employees "waiting in line" for contract operator vacancies. When an opening occurs, the contract operator is required to make an investment in the inventory of the business, which consists of the value of laundry and drycleaning services performed on the clothing currently in inventory. This investment ranges from $500 to $1,500 and is paid either to the contracting Pilgrim company or to the previous operator.

In most cases the Pilgrim company furnishes the site of the store, as well as all advertising, utilities, liability insurance, security devices, cash registers, equipment and other fixtures within the store. The commission or discount rate under the agreement is usually a "net deal" which takes into account the fact that the contracting Pilgrim company pays all utilities, rent and similar costs. The contract operator receives a percentage of the value of laundry and drycleaning processed for his customers. There are no standard hours of operation. The hours are set by the operator to meet the convenience of the particular market, but generally are similar due to competitive factors. The contract operator bears the losses from bad checks, extensions of credit and losses from theft by employees of the contract operator.

While the Pilgrim companies provide suggested price lists, they vary in different areas depending upon competition, and the operators are free to charge higher prices on such items as tuxedos and dresses with frills and lace.

None of the contract operators made any complaint nor sought the protection of the FLSA. Each one who

testified was subpoenaed by the plaintiff and each made it clear that she was not controlled in the operation of her business by Pilgrim; that there was opportunity for gain or loss depending upon the skills of the operator; that opportunities for additional income were available through the sale of ties, wigs and other items, and that she regarded herself as an independent businessperson and desired to continue in that way. Typical was the testimony of Ms. Mabel Gaul:

"Q. When you say, 'it is your business', whose business is it?
"A. It is my business.
"Q. Well do you work for Pilgrim or does Pilgrim work for you?
"A. Pilgrim works for me.
"Q. How does Pilgrim work for you?
"A. I pay money rent for the building, and each day I pay them for cleaning clothes for me, and at the end of each week, I make a settlement with them. All the clothes that are in that store, I consider mine until the customer comes in and retrieves them.
"Q. Does the Pilgrim Company tell you how to run your business?
"A. No. No they don't.
"Q. Do they run your business?
"A. No, they sure don't." (Tr. 217).

In short, as the trial court found, "Each operator who testified clearly relished the idea that she was in charge of her own business enterprise, free from control of the contracting Pilgrim company, and that the success of the business was dependent on her individual efforts and accomplishments." (Appendix, infra, 28A)

REASONS FOR GRANTING THE WRIT

1. This Court's 1947 trilogy has been erroneously interpreted by the Courts of Appeal so as to make *everyone* an "employee" under the FLSA.

Implicit in the omission of independent contractors from coverage of the FLSA is the recognition that not all workers are "employees." Because "employee" is only generally defined in the Act,[5] this Court acted to establish guidelines for determining who is an employee and who is an independent contractor.

In the trilogy this Court, construing the FLSA to accomplish its remedial objectives, substituted broad alternative criteria for the common law concepts of employee and independent contractor. It was recognized that while no simple "rule of thumb" would suffice, the line between employees and independent contractors must be drawn somewhere. In fact, in two of the three trilogy cases the line was drawn so that the individuals in question were independent contractors rather than employees.[6] In specifically recognizing the viability of the independent contractor concept, this Court stated:

> "Of course, this does not mean that all who render service to an industry are employees."[7]
>
> "There may be independent contractors who take part in production or distribution who would alone be responsible for wages and hours of their own employees."[8]

5. 29 U.S.C. 203.

6. See *Bartels* and *Silk* cited in Note 2 supra.

7. *United States v. Silk*, supra, 331 U.S. 704 at 712.

8. *Rutherford Food Corp. v. McComb*, supra, 331 U.S. 722 at 729.

Thus, this Court, in both reasoning and result held that not everyone is an "employee" for FLSA purposes. Yet the subsequent construction given the trilogy by appellate courts has yielded the opposite result.

Every case decided by the appellate courts since the trilogy has applied the tests so as to conclude that the individuals involved were employees and not independent contractors.

Time and again trial courts have held on the basis of the facts presented to them that the individuals in question were independent contractors, only to be reversed by the court of appeals.[9] In one case the court of appeals did affirm the independent contractor holding of the district court, only to be reversed by this Court.[10] The cumulative effect is best described by the often quoted comment by Mr. Justice Stewart in his dissent in one of this Court's Clayton Act cases: "The sole consistency that I can find is that in litigation under Section 7, the government always wins."[11]

This remarkable unanimity of result is attributable to the distillation of the several trilogy criteria into one—economic realities. Although *Rutherford* warns against

9. See, for example, ***Fahs v. Tree-Gold Co-Op Growers of Florida, Inc.***, 166 F.2d 40 (5th Cir. 1948), ***Mitchell, Secretary of Labor v. Strickland Transportation Company***, 288 F.2d 124 (5th Cir. 1955), ***Mitchell, Secretary of Labor, v. John R. Cowley & Bro., Inc.***, 292 F.2d 105 (5th Cir. 1961), ***Schultz, Secretary of Labor v. Hinojosa***, 432 F.2d 259 (5th Cir. 1970), ***Brennan, Secretary of Labor v. Partida***, 492 F.2d 707 (5th Cir. 1974), ***Mednick v. Albert Enterprises, Inc.***, 508 F.2d 297 (5th Cir. 1975).

10. ***Goldberg, Secretary of Labor v. Whitaker House Cooperative, Inc.***, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).

11. ***United States v. Von's Grocery Company***, 384 U.S. 270, 301, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966)

exalting form over substance in its recognition that the "underlying economic realities" control,[12] subsequent cases culminating in *Partida* and *Mednick*[13] have converted this admonition into a definition of "employee" by saying that "underlying economic realities" equals "economic dependency," and "economic dependency" *always* equals employee rather than independent contractor. However, all businesspersons are necessarily dependent on those with whom they do business. Thus, even the band leaders in *Bartels* and the truck owners in *Silk* would be employees under the test now being applied by the Courts of Appeal.

This unjustifiably broad application of the FLSA is not only legally indefensible, it is denigrating to those who consider themselves to be independent businessmen. While certainly not controlling, the wants and desires of the workers whose fate is determined by the interpretations of the FLSA should be considered. In the instant case, there are no aggrieved or unprotected persons seeking the protection of the FLSA. There is no "mischief to be corrected."[14] The testimony of the contract operators subpoenaed by the plaintiff established that each considers herself an independent businessperson who desires to remain so. Indeed, after hearing the evidence and weighing the facts, the trial court observed:

> "If it is possible under the Act, to have one who is not an employee, in the general category of the kind

12. ***Rutherford Food Corp. v. McComb*** supra, 331 U.S. 722, 727.

13. ***Brennan, Secretary of Labor v. Partida***, 492 F.2d 707 (5th Cir. 1974), ***Mednick v. Albert Enterprises, Inc.***, 508 F.2d 297 (5th Cir. 1975), Note 5, supra.

14. ***United States v. Silk***, supra, 331 U.S. 704 at 713.

of activity these people do, they are certainly not employees on the balance and the application of the six suggested criteria, and I, first with respect to the economic reality, it seems to me that it is clear from the testimony that from the standpoint of these ladies, they welcome the opportunity to become independent operators and station operators . . . . Of course, control is an extremely important concept, and I was impressed from the standpoint of the testimony with the attitude of the ladies, each of whom seemed to relish the fact that there was very limited, if any, control over the conduct of her operation, and I think that is something that people are inclined to overlook these days, since the tendency is to try to fit everybody into a category, put everybody in the same mold, and these were ladies who like to feel like they were independent, that they were doing something on their own, running or operating their own business, and it destroys something in people when you deprive them of the opportunity to have that personal satisfaction in individual accomplishment, and I think it would be a very sad day when the courts would just force everybody into a mold in a situation like this and not let people have some choice, give them an option." (Tr. p. 334-339)

Petitioners do not contend that the tests set forth in the trilogy are wrong, but, rather, that the appellate courts are applying the tests in an unjustified and inequitable manner. Because of the importance of a correct understanding and application of these tests to the proper enforcement of the FLSA, certiorari should be granted in this case.

2. Judicial interpretation of the FLSA is inconsistent with Congressional intent.

Two cases decided by this Court prior to the 1947 trilogy explored the legislative history to determine the

Congressional intent in enacting the FLSA.[15] *Brooklyn Savings Bank* found an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours. It held that the statute was a recognition of the fact that due to the unequal bargaining power between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered the national health and efficiency. *Walling* found that the FLSA was intended to correct a specific and identifiable problem, i.e., low wages and long hours which were imposed upon employees who were at the mercy of their employers.

In the trilogy the intent of Congress was explained in the following language:

> "The Fair Labor Standards Act was passed by Congress to lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions. An effort to eliminate low wages and long hours was the method chosen to free commerce from the interference arising from production of goods under conditions that were detrimental to the health and wellbeing of workers."[16]

Finally, this Court recognized that there was no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution.[17]

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15. *Brooklyn Savings Bank v. O'Neal*, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945), and *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947).

16. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 at 727.

17. *United States v. Silk*, 331 U.S. 704 at 713.

Despite these repeated statements of the Congressional intent, the appellate courts have blindly applied the FLSA so as to bring everyone within the "employee" definition regardless of whether its protection is needed or wanted. This expansive judicial interpretation is illustrated by the application given to the facts in the case at bar. Notwithstanding the uncontradicted evidence that the independent contractors made more money than the admitted employees, that the independent contractor status was greatly desired and sought after so that there were more people seeking the post of independent contract operator than there were positions available, and that the employees who became independent contract operators did so of their own free will, the Court of Appeals held that the FLSA was applicable.

It is clear that the FLSA's reach has exceeded its intended grasp. The conflict between the intent of Congress in enacting the FLSA and the judicial interpretations extending it justify a grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and Opinion of the Fifth Circuit.

Respectfully submitted,

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Date: May 24th, 1976.

CERTIFICATE OF SERVICE

I hereby certify that on this 25 day of May, 1976, three copies of the Petition for Writ of Certiorari were mailed postage prepaid to the Solicitor General, Department of Justice, 20530, and three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to W. J. Usery, Secretary of Labor, Attention Mr. Donald S. Shire, Office of the Solicitor, U. S. Department of Labor, Room 4141, Main Labor, 14th and Constitution Avenue N.W., Washington, D. C. 20210.

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APPENDIX

W. J. USERY, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellant,

v.

PILGRIM EQUIPMENT COMPANY, INC., et al.,
Defendants-Appellees.

No. 74-2909.

United States Court of Appeals,
Fifth Circuit.

March 3, 1976.

Proceeding was brought by Secretary of Labor challenging independent contractor status assigned by related corporations to approximately 60 female operators of laundry pickup stations. The United States District Court for the Southern District of Texas, James L. Noel, Jr., J., concluded that operators had been correctly classified as nonemployees for wage and hour purposes under Fair Labor Standards Act and denied relief, and Secretary appealed. The Court of Appeals, Clark, Circuit Judge, held that where operators were not allowed to control any meaningful portion of businesses they allegedly ran, related corporations managed major variables which determined each operator's profit, substantially all risk capital was supplied, there was no operator who as economic entity was capable of doing business elsewhere, and no unique skill or initiative was required of operators, decree of dependence by operators on related corporations

mandated conclusion that operators were employees for purposes of Fair Labor Standards Act.

Reversed and remanded.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, CLARK and RONEY, Circuit Judges:

CLARK, Circuit Judge:

The Secretary of Labor challenges the independent contractor status assigned to approximately 60 women operators of laundry pick-up stations by 10 related corporations, which we group here under the common appellation Pilgrim.[1] In capsule, each operator works at a separate location to which customers bring items to be cleaned. Pilgrim picks up, cleans and returns the items. The operator then makes delivery to the customer and collects the cleaning price.

Concluding from undisputed facts that Pilgrim had correctly classified these operators as nonemployees for wage and hour purposes under the Fair Labor Standards Act (FLSA),[2] the district court denied the relief sought by

1. The named defendants in this action include: Pilgrim Equipment Company, Inc., a corp.; Pilgrim Convenience, Inc., a corp.; R.F.S., Inc., No. 10, a corp., d/b/a Pilgrim Laundry Co. No. 18; Pilgrim Laundry Co. No. 5, Inc., a corp.; R.F.S., Inc. No. 2, a corp., d/b/a Pilgrim Laundry Co. No. 8; Tower Development Corp., a corp., d/b/a Pilgrim Laundry Co. No. 16; R.F.S., Inc. No. 5, a corp., d/b/a Pilgrim Laundry Co. No. 11; R.F.S., Inc. No. 8, a corp., d/b/a Pilgrim Laundry Co. No. 15; Pilgrim Laundry Co. No. 3, Inc., a corp.; and R.F.S., Inc. No. 7, a corp., d/b/a Pilgrim Laundry Co. No. 14.

2. 29 U.S.C. § 201 et seq.

the Secretary's complaint. Although it framed its findings in the proper indicia for testing statutory employee status, the district court's conclusion of what the frame enclosed failed to give sufficient emphasis to the all-pervasive determinant economic dependence. The legal conclusion reached by the trial court from its factual findings was, therefore, in error. We reverse and remand for a determination of the appropriate relief for these employees.

[1] The purpose of the FLSA is to "eliminate low wages and long hours" and "free commerce from the interferences arising from production of goods under conditions that were detrimental to the health and well-being of workers."[3] The statutory scheme makes the wage and hour provisions applicable to "employees." Employee is defined as one "employed," and "employ" is defined as "to suffer or permit to work."[4] Given the remedial purposes of the legislation, an expansive definition of "employee" has been adopted by the courts.

> As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[5]

3. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, 67 S.Ct. 1473, 1475, 91 L.Ed. 1772 (1947).

4. 29 U.S.C. § 203(e) & (g).

5. *United States v. Silk*, 331 U.S. 704, 712, 67 S.Ct. 1463, 1467, 91 L.Ed. 1757 (1947).

The common law concepts of "employee" and "independent contractor" have been specifically rejected as determinants of who is protected by the Act.[6] The test is not one which allows for a simple resolution of close cases. However, the lesson taught by the Supreme Court's 1947 trilogy[7] is that any formalistic or simplistic approach to who receives the protection of this type legislation must be rejected. In *Bartels v. Birmingham,* 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947), the Court held that "in the application of social legislation employees are those who as a matter of economic reality are *dependent* upon the business to which they render service."[8]

[2] Five considerations have been set out as aids to making the determination of dependence, *vel non*. They are: degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill

6. The terms "independent contractor," "employee," and "employer" are not to be construed in their common law senses when used in federal social welfare legislation. *N.L.R.B. v. Hearst,* 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (for purposes of the National Labor Relations Act); *United States v. Silk,* 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947), and *Bartels v. Birmingham,* 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947) (for purposes of employment taxes on employers under the Social Security Act, as amended); and *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947) (for purposes of the Fair Labor Standards Act). Rather, their meaning is to be determined in light of the purposes of the legislation in which they were used. *Mednick v. Albert Enterprises, Inc.,* 508 F.2d 297, 299 (5th Cir. 1975).

7. *Bartels v. Birmingham,* 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947); *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *United States v. Silk,* 331 U.S. 704, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947).

8. 332 U.S. at 130, 67 S.Ct. at 1550 (emphasis added).

required.[9] No one of these considerations can become the final determinant, nor can the collective answers to all of the inquiries produce a resolution which submerges consideration of the dominant factor—economic dependence. *See Mednick v. Albert Enterprises, Inc.,* 508 F.2d 297 (5th Cir. 1975). The five tests are aids—tools to be used to gauge the degree of dependence of alleged employees on the business with which they are connected. It is *dependence* that indicates employee status. Each test must be applied with that ultimate notion in mind. More importantly, the final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of FLSA or are sufficiently independent to lie outside its ambit. Reviewing each of the five indicia used by the lower court, with the emphasis placed as required, compels the ultimate conclusion that the pick-up station operators in this case were dependent on Pilgrim and, therefore, come within the Act. It also discloses that the district court's factor-by-factor resolutions were wrong.

I. Control

[3] The district court determined that operators are largely independent of their manager's control. On the

9. *United States v. Silk,* 331 U.S. 704, 716, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947). *See, Bartels v. Birmingham,* 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947); *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *N.L.R.B. v. Hearst,* 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). Although several of these cases deal with similar but different statutes, *Rutherford* adopts decisions under the "Labor and Social Security Acts" as "persuasive in the consideration of a similar coverage under the Fair Labor Standards Act." 331 U.S. at 723, 67 S.Ct. at 1474.

other hand, a look at the rules and restrictions on the operators contained in the written lease agreement and the undisputed facts shows the operators are totally dependent upon Pilgrim to provide direction or control in every major aspect of their work. Pilgrim handles substantially all advertising for the stations. It sets the prices charged for all but a few nonstandard items. It requires that operators deal exclusively with Pilgrim Laundries.[10] It prevents the assignment of the lease arrangements which govern the parties' respective obligations. It requires that each operator remit a certain amount of money every day for the cleaning work done by Pilgrim. It requires that accounts be settled between Pilgrim and each operator once a week. It prevents operators from posting any signs on the premises unless prior permission is given. It prevents any improvement to the premises without permission. The lease is drawn by Pilgrim and the only negotiated item is the percentage of income the operator would retain, an item which is usually unilaterally imposed at the outset by Pilgrim and then negotiated on the anniversary of each contract. Pilgrim maintains the right to specifically enforce or declare the contract void if any covenant is not performed by the operator. The contract has a duration of 1 year. Each operator is given the right to set her own hours, hire helpers and is not subject to inspection of supervision in the minor details of her daily operation. A sign posted on the front door of each pick-up station, however, states the standard Pilgrim Laundry hours. With minor exceptions, all operators testified that they followed these hours. Some of the operators hired helpers or substitutes from time to time and some did not.

10. See note 1, *supra*.

In the total context of the relationship neither the right to hire employees nor the right to set hours indicates such lack of control by Pilgrim as would show these operators are independent from it. In reality, even the hours are "controlled" by Pilgrim. It is not significant how one "could have" acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.[11] Moreover, women who work at home, completely free of specific hour requirements, have been found to be employees for purposes of this Act.[12] Occasional exercise of the right to hire helpers also has not been found sufficiently indicative of independence to allow a finding of nonemployee status.[13]

The most significant conclusion from all these facts is that the operators cannot exert control over any aspect of their business lives independent of Pilgrim. They have no viable economic status that can be traded to other laundry companies and the lack of supervision over minor regular tasks cannot be boot-strapped into an appearance of real independence.[14] Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity. All meaningful aspects of this business—

11. See *Mednick v. Albert Enterprises*, 508 F.2d 297, 302-03 (5th Cir. 1975); *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 109 (5th Cir. 1961).

12. *Goldberg v. Whitaker House Cooperative*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).

13. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301 (5th Cir. 1975); *Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 128 (5th Cir. 1955).

14. *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961).

advertising, right to deal with other cleaning plants, price fixing, payment arrangements—are controlled by Pilgrim.

II. Opportunity for Profit or Loss

The lower court concluded that the opportunities for profit or loss, were the same as in any independent business. The major determinants of the amount of profit which an operator could make, however, were directly controlled by Pilgrim. Since the operators were paid on a percentage basis, the amount of business done by an operator governs total profit. The lower court found that convenience of hours, extra service provided, and rapport with customers were factors which affected profits and were within the control of each operator. However, price, location, and advertising—determinants of customer volume at least as vital as those governed by the operators—are regulated by Pilgrim.

[4] The record shows some operators sold ties, wigs, or took in special work in their pick-up stations. These sales minimally supplemented their income. Such minor additional income made from work which is not connected with the actual business under examination is not relevant to a court's determination of employee status.[15]

[5] Finally, except for being responsible for bad-check and theft losses, there is no way any of the operators can suffer a loss in their alleged independent contractor operations. Each week they receive a percentage of the total money taken in by their pick-up station. The lease requirement—which the record does not show was ever subject to negotiation—that the operators accept responsibility for bad-check and theft losses does not show

15. *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974).

independence. Rather it shows that Pilgrim chose to place this added burden on its operators. Persons with similar pecuniary obligations have been found to be employees.[16]

No opportunity for loss of the capital investment in the station's operation and control by Pilgrim of major determining factors of profit indicate that the operators are dependent upon Pilgrim, and therefore, that they are employees.

III. Investment

[6] The lower court found that the operators' "investment" was modest, but concluded that it was substantial from the point of view of each operator. The investment referred to by the lower court was the requirement that each operator "purchase" the cleaning charge values in the clothing already on hand at the pick-up station when she took over the operation. The "investment" transaction bears no direct relationship to the overall cost of operating the station. It is actually an assumption of accounts receivable. No risk capital whatsoever is involved.[17]

At the outset of the business relationship between Pilgrim and each operator, the new operator is required to pay the outgoing operator (or Pilgrim if Pilgrim had already reimbursed the outgoing operator) the total amount which the outgoing operator had paid Pilgrim to clean clothes not yet picked up by customers. This

16. *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301 (5th Cir. 1975), *citing, Hodgson v. Pulley*, 20 W.H. Cases 1046 (S.D. Ohio, 1972).

17. *See Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 301 (5th Cir. 1975); *Hodgson v. Pulley*, 20 W.H. Cases 1046 (S.D. Ohio, 1972); *Hodgson v. Sureway Cleaners*, 20 W.H. Cases 358 (E.D. Cal. 1971).

"investment" varies from 500 to 1500 dollars. Often it is financed by Pilgrim, and its return is guaranteed. As customers pick up their clothes and pay for them, the operator recoups her "investment." Any clothes which remain in the station for 6 months are purchased by Pilgrim. Therefore, within 6 months the total "investment" is recovered. In addition, when the operator terminates her arrangement with Pilgrim, she will be reimbursed for all monies paid by the operator to Pilgrim for clothing not yet retrieved and paid for by customers. This entire "investment" plan is nothing more than a method of settling accounts between outgoing and incoming operators.

All investment or risk capital is provided by Pilgrim. It furnishes the station, cash register, fixtures, security devices, counters, racks, hangers, bags, tags, receipts, utilities, telephone, and liability insurance. The 10 dollar per-year rental set up for these capital items is so nominal as to be deminimis.

But for Pilgrim's provision of all costly necessities, these operators could not operate. Their total dependency upon Pilgrim is confirmed rather than denied by these facts.

IV. Permanency

[7] The lower court found that although many operators had enjoyed a longtime relationship with Pilgrim, the permanency of the relationship evidenced satisfaction with and not dependence on Pilgrim. Most, if not almost all, long time employees are satisfied with their employment. Regardless of subjective satisfaction, the permanent nature of the relations between Pilgrim and these operators indicate dependence. The contract involved here is for a 1 year duration and is routinely renewed. Many of the operators have previously served as Pilgrim's employees and are performing essentially the same functions as operators.[18] Not a single operator is shown to be capable of terminating relations with Pilgrim and taking her organization to another laundry.[19] The operators have nothing to transfer but their own labor. The plain fact of the matter is that every one of them is dependent upon Pilgrim's continued employment.

V. Skill

[8] The lower court correctly concluded from the record that these operators did not need long training or highly developed skills. However, it went on incorrectly to accentuate considerations such as business sense, salesmanship, personality and efficiency concluding that these needed skills were probative of employee status. The key missing ingredient in the lower court's determination is initiative. Routine work which requires industry and efficiency is not indicative of independence and nonemployee status.[20] These operators are unable to exert initiative in the operation of their pick-up stations. All major components open to initiative—advertising, pricing, and most importantly the choice of cleaning plants with which to

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18. *See Wirtz v. Welfare Finance Corp.*, 263 F.Supp. 229 (N.D. W.Va. 1967).

19. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 67 S.Ct. 1473, 1477, 91 L.Ed. 1772 (1947); *Bartels v. Birmingham*, 332 U.S. 126, 132, 67 S.Ct. 1547, 1551, 91 L.Ed. 1947 (1947).

20. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 108 (5th Cir. 1961); *Mitchell v. Strickland Transportation Co.*, 228 F.2d 124, 126-27 (5th Cir. 1955).

deal—are controlled by Pilgrim. Much emphasis was placed on the need to keep business records and the need for rapport with customers. Minor record-keeping such as personal tax records is not determinative of independent status. Customer rapport is not an "initiative" characteristic and much more closely parallels "efficiency." But to the extent it does require "initiative," it is signicantly controlled, or at least continuously encouraged, by Pilgrim through the commission-rate payment arrangement. The operators receive a percentage of the money paid for each item cleaned. Obviously, encouraging repeat customers enhances financial reward under this payment scheme.

Operating these laundries requires courtesy to customers, tagging clothes, taking money from customers, paying Pilgrim a set amount each day for cleaning, settling accounts (getting paid) once a week, occasionally hiring helpers, and correctly reporting tax and Social Security information. The skills and incentives required in the operation of the pick-up stations are valuable. They bring business profits to the operators and to Pilgrim. But many successful employees need these same abilities and perform similar tasks. The bottom line in this enterprise is the business acumen and investment contributed by Pilgrim. The operators were dependent on it for their livelihood.

VI. Other Indicia

[9] We reject both the declaration in the lease agreement that the operators are "independent contractors" and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling

FLSA employee status. Neither contractual recitations[21] nor subjective intent[22] can mandate the outcome in these cases. Broader economic realities are determinative.

[10] In deciding whether these operators are employees for the purposes of the Fair Labor Standards Act,

> [t]he ultimate criteria are to be found in the purposes of the Act. . . .
>
> [T]he Act is intended to protect those whose livelihood is dependent upon finding employment in the business of others. It is directed toward those who themselves are least able in good times to make provisions for their needs when old age and unemployment may cut off their earnings . . . to those who, as a matter of economic reality, are dependent upon the business to which they render service.
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> *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 300 (5th Cir. 1975), *quoting Fahs v. Tree-Gold Co-op Growers, Inc.*, 166 F.2d 40, 44 (5th Cir. 1948).

[11] The overview discloses that these operators are not allowed to control any meaningful portion of the business they allegedly run; Pilgrim manages the major variables which determine each operators profit. The compensation scheme is such that there is never any real risk that an operator will suffer loss. Substantially all risk capital is supplied by Pilgrim. The relationship is fairly permanent and there is no operator who, as an economic

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21. *United States v. Silk*, 331 U.S. 704, 715, 67 S.Ct. 1463, 1469, 91 L.Ed. 1757 (1947); *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 302 (5th Cir. 1975); *Mitchell v. John R. Cowley & Bro., Inc.*, 292 F.2d 105, 107 (5th Cir. 1961).

22. *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974); *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508 (5th Cir. 1969).

entity, is capable of doing business elsewhere. No unique skill or initiative is required of the operators. Proper application of the five indicia, singularly and collectively, indicate substantial dependence on Pilgrim. The Act is designed to protect individuals whose employment status is so dependent on the whims of the employer as to make them submissive to an employer's notion of fair compensation for their labor. The degree of dependence by the operators upon Pilgrim in this case mandates a conclusion that the operators are employees under the FLSA. Therefore, the decision of the lower court is reversed and the case is remanded to determine the appropriate relief.

Reversed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACION
NO. 71-H-968

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

PILGRIM EQUIPMENT CO., INC., ET AL,
Defendants.

MEMORANDUM AND ORDER

The Secretary of Labor, United States Department of Labor, brought this suit under the Fair Labor Standards Act, as amended, 29 U,S.C. §201 et seq. (hereinafter the Act), to enjoin defendants from violating the minimum wage and overtime provisions of sections 15(a)(2) and 15(a)(5), and to restrain the withholding of payment of minimum wages and overtime. Plaintiff contends certain individuals are defendants' employees. Defendants assert they are independent contractors, not "employees" under the terms of the Act, and therefore are not subject to the Act's requirements. The parties presented testimony and documentary evidence at trial before the Court, April 15, 1974. On the basis of the record, the Court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Mr. Guy Robertson is President, Chief Executive Officer, and a principal shareholder in defendant Pilgrim Equipment Co., Inc. (hereinafter PECO). PECO has stock ownership in the other defendant companies (hereinafter "Pilgrim companies") in the following percentages:

Corporation	Percentages of Outstanding Corporate Shares of Stock Owned
R.F.S., Inc., No. 10 d/b/a Pilgrim Laundry Co. No. 18	100%
Pilgrim Laundry Co. No. 5, Inc.	50%
R.F.S., Inc., No. 2 d/b/a Pilgrim Laundry Co. No. 8	50%
Tower Development Corp. d/b/a Pilgrim Laundry Co. No. 16	50%
R.F.S., Inc., No. 5 d/b/a Pilgrim Laundry Co. No. 11	50%
Pilgrim Convenience, Inc.	50%
R.F.S., Inc., No. 8 d/b/a Pilgrim Laundry Co. No. 15	50%

The term "Pilgrim Company" as used hereinafter is all of the defendant Pilgrim companies.

During the period in question, each defendant has had employees engaged in commerce or in production of goods for commerce. Each defendant Pilgrim Company is coordinated and controlled so as to operate and function as a single, unified enterprise. Each corporation operates

several laundry and dry cleaning plants in the Houston and San Antonio, Texas areas.

Certain laundry and dry cleaning facilities are operated under franchise arrangements with PECO and use the Pilgrim name. None of the franchised operations were named as defendants in this cause. Their operations are not involved in this suit.

Each of the Pilgrim Companies operates at least one plant for processing and cleaning clothing, and a number of pickup substations. Each substation receives clothing for processing at the plant with which it is associated, and returns such clothing to customers after cleaning. Each plant has a "counter operation" for receiving clothing, which is considered a substation. The remaining substations are dispersed throughout the geographic area surrounding the plant. Most substations are located in stores measuring 1,000 square feet in area. Each substation has a counter, register, racks and other equipment used for maintaining and processing clothing for laundry and dry cleaning. As customers deliver the clothing to the substation, the operator receives the clothes, marks them for identification, and prepares them for processing. The clothing is routinely picked up by a delivery truck operated by the related plant. After processing in the plant the clothing is then redelivered to the substation for return to the customers. The processing of clothing consists of dry cleaning, or laundering, or both.

2. Each substation is operated either by employees of one of the Pilgrim Companies (hereinafter referred to as employee operators), or by an individual who has a contract with the particular Pilgrim Company to operate the substation (hereinafter referred to as a contract ope-

rator). The Secretary contends that each particular contract operator is the employee of a particular defendant. Each defendant contends that the contract operators who operate its substations are independent contractors.

3. Unlike employee operators, contract operators sign a writing denominated "Lease Agreement and Contract" (hereinafter "Lease Agreement") with a Pilgrim Company, which governs the relationship between the operator and the particular Pilgrim Company (sometimes referred to herein as "contracting company"). Each lease agreement is effective for a one year term and is automatically extended unless either party chooses to terminate. The relationship of the parties under each Lease Agreement is denominated as that of owner (the particular Pilgrim Company) and independent contract (the operator). Each Lease Agreement provides for owner to furnish the substation and equipment and requires owner to carry liability insurance on the premises, machinery, equipment and fixtures.

4. Under the Lease Agreement each contract operator agrees to deliver all clothing and other garments exclusively to the contracting company for laundering and cleaning. The contract operator agrees to pay a stated amount to the contracting company each day for laundering and dry cleaning. At the end of each one week period, the contracting company agrees to bill the contract operator for the total amount of laundry and dry cleaning work performed for the substation, and the contract operator agrees to remit to the contracting company that amount, less a stated "percentage" which the operator retains from the gross receipts of the business.

5. Each contract operator agrees to hire his (or her) own employees. The contracting company is not responsi-

ble for obtaining or administering workmen's compensation insurance, social security, or Texas Unemployment Compensation taxes for the contract operator or his employees. The contract operator especially assumes all responsibility for these items and agrees to keep all appropriate records and books for such purposes.

6. Under the terms of the lease agreement, the contract operator may set his own hours of business, opening and closing times. The contract operator is free from the control of the contracting company as to the performance of the contract and for any services rendered by the contract operator to the contracting company. Any credit extended to the public by the contract operator is deemed to be his sole risk. In the event the contract operator becomes bankrupt or makes a voluntary assignment for the benefit of creditors, or in the event that a receiver is appointed for the contract operator, then, at the option of the contracting company, and upon the expiration of five days' notice to the contract operator, the agreement is terminated.

7. Each contract operator agrees to maintain all property and fixtures in the substation, and to keep the premises in good repair. The contract operator agrees to accept possession of the premises in their present condition, and agrees to allow for changes in the equipment occurring by reason of deterioration while occupying the premises. The contract operator agrees that there shall be no improvements or alterations to the premises without the consent of the contracting company.

8. Each contract operator agrees to comply with all ordinances of the City of Houston, or the City of San Antonio applicable to the premises, and all orders and

requirements imposed by the Board of Health, Sanitary and Police Departments, and agrees to correct, prevent, and abate nuisances in or upon or connected with the premises during the term of the agreement.

9. The contract operators agree not to assign the agreement or sublet the premises or make any alterations in the building without the consent of the contracting company.

10. In the event of default of the covenants in the contract, the contracting company may enforce the performance under the lease in any manner provided by law. The lease agreement may be forfeited at the contracting company's discretion if the default continues for a period of ten days after notice. Upon such notice (unless the contract operator agrees to completely remove or cure the default), the agreement is terminated and the contracting company's agent or attorney may re-enter and remove all persons and the property of the contract operator.

11. Each contract operator agrees not to place any signs at, on, or about the premises except as approved by the company. The contracting company may remove any sign or signs in order to paint the building or to make repairs or alterations.

12. Under the lease agreement, the contracting company is not the owner of the substation premises, but merely holds a lease of the property. The lease remains subject to all the terms and conditions of the existing lease under which the contracting company holds the premises.

13. Prior to their association with Pilgrim Companies, some contract operators had prior experience in the clean-

ing business with non-Pilgrim establishments. Most did not, and many had no prior business experience. Most contract operators have had prior experience in operating substations as employees of a Pilgrim Company. Becoming a contract operator is regarded as a coveted opportunity by such employees. There are numerous employees "waiting in line" for contract operator vacancies. None of the Pilgrim Companes advertise contract operator openings.

14. Usually the contract operator is required to make an investment in the "inventory" of the business, which consists of the value of the laundry and dry cleaning services performed on the clothing in inventory. This investment ranges from $500.00 to $1,500.00. The investment is either paid to the contracting Pilgrim Company, or to the previous contract operator who operated the substation. Usually a new location is operated as an employee store until the volume is sufficient to operate under contract. The contract operator's investment is typically financed by the particular contracting Pilgrim Company or by a bank. The contract operator is repaid the investment over a period of time out of his earnings. In most cases, PECO furnishes the site of the store and arranges for all advertising for the contract operated stores. PECO also furnishes all utilities, liability insurance, security devices, cash registers, equipment, and other fixtures within the store.

15. The commission or "discount" rate under the terms of the agreement is usually a "net deal", which takes into account the fact that the contracting Pilgrim Company pays all utilities, rent, and similar costs as provided in the lease agreement. The contract operator receives a percentage of the value of laundry and dry cleaning

processed for customers. The stores operated under contract do not have standard hours of operation. The hours are set to meet the convenience of the particular market, but generally the hours of most are similar, due to competitive factors. The contract operator bears the losses of bad checks, extension of credit and losses from theft by employees of the contract operator. The contract operators hire their own employees, and are responsible for all withholding of federal income tax, FICA and other such deductions.

16. The parties consider the lease agreements as binding contracts. Some of the Pilgrim Companies have experienced litigation by contractors to enforce the agreements. The Court finds that the Pilgrim Companies have given full force and effect to the lease agreements and that the parties thereto have consistently regarded them as bona fide, arms-length transactions.

17. PECO provides a suggested price list to the contracting Pilgrim Companies. The prices on the suggested price list will vary in different areas of the city, depending on competition. While prices charged for "standard" items such as shirts, suits, blouses, etc., seldom vary from the suggested list price, contract operators are free to charge higher prices on so-called "flexible" items, such as tuxedos, dresses with frills and laces, and other such items.

18. A witness subpoenaed and called by the Government, Mabel Graul, has been under contract with Pilgrim Company No. 18 for four or five years. Her testimony evidenced that the contract is generally followed. Any deviation is in the direction of more freedom and independence for the operator than is provided by the con-

tract. Prior to contracting with the Pilgrim Company, Mrs. Graul worked for another laundry and dry cleaning company. Mrs. Graul accepted the initial commission rate offered because she considered that to be commensurate with her worth as an inexperienced businesswoman. Subsequently, she has gained more experience and has built up her business. She has renegotiated her agreemnt with the manager of Pilgrim Company No. 18 for a higher discount commission rate on several occasions.

Mrs. Graul clearly considers herself an independent businesswoman, and her substation as her own business. She has a sign in her establishment which reads, "Mabel P. Graul, Manager." She stated the Company does not run her business or tell her how to do so. She testified that "[a]ctually Pilgrim works for me. . ." and ". . . that I do not work for Pilgrim." She considers herself responsisible for the clothing. She demands the Pilgrim clean and launder the clothes properly and has made complaints to Pilgrim about the quality of the work. Mrs. Graul testified that there are many opportunities to build up the business by knowing the clothing and doing extra work for the customers, such as sewing on buttons, removing spots, and other personal attention.

Mrs. Graul sets her own hours. At her own initiative, she opens her station early in the morning to accommodate several customers. She accepts checks but not credit cards and tries to collect on bad checks. She rarely issues credit. She sells other items, such as ties, for additional income of $10.00-$25.00 per month. At her own option, she frequently remits money to her contracting Pilgrim Company in excess of that required by the contract. This enables her to reduce the amount of cash on hand, thereby

reducing exposure to robberies and avoiding frequent trips to the bank. Her Pilgrim Company provides advertising for her, but Mrs. Graul also places advertisements in local newspapers and promotes her business through her church.

Mrs. Graul hires and pays her own employees to operate the store in her absence, including when she is on vacation. She does not receive vacation or other benefits from her Pilgrim Company. The latter provides a "suggested" price but does not assist in pricing unusual items, such as frilly dresses. Mrs. Graul sets her own prices on these items.

19. Mrs. Margaret Stratton has operated under a contract since approximately 1965. She started in the cleaning business as an employee of her Pilgrim Company, learned the operation and then requested a contract. She paid approximately $1,000.00 for her inventory. She considers the business to be hers. Her Pilgrim Company manager does not come into the store unless she requests his presence. She stated that her Pilgrim Company does not operate her business for her or tell her how to do so. She stated that there is an opportunity to build up and increase the business by giving good service, being good to the customers, being responsive and knowing the clothing. She has developed her good will over the years by serving her customers in this fashion. She previously operated a facility in Bellaire. When she transferred to her present location, about 25% of her customers at the previous store followed her to the new location.

At her own discretion, Mrs. Stratton takes in reweaving and leather goods, which she contracts for processing outside her contract with Pilgrim Company. She receives

income of approximately $200.00 per year from these sources. Mrs. Stratton also sells additional items such as ties and wigs. She previously sold panty hose but discontinued the practice because of customer theft. She estimated her total income was approximately $600.00 per year from the sale of ties, wigs, and panty hose.

Mrs. Stratton presently employs two people, paying them out of her own funds. On one occasion when she was unable to procure substitute help, her manager supplied a Pilgrim Company employee and billed Mrs. Stratton for the work. She sets her own hours of operation which she has frequently changed. She made plans to stay open until 9:00 p.m. but because the employee did not report to work regularly, she discontinued the late hours. Mrs. Stratton has sustained losses from employee theft of approximately $400.00. She has suffered losses in 1974 from bad checks in the amount of $200.00.

20. Mrs. Faye Smith, a witness subpoenaed and called by plaintiff, has operated as contract operator for Pilgrim Company No. 16 for approximately one year. Prior to contracting with that company, Mrs. Smith had operated as contract operator for various Pilgrim Companies since 1958. She was offered a number of different stores, but she chose the one she currently runs because she believed it was capable of a high volume. Her commission rate is negotiable and determined by "arguing with the manager." Mrs. Smith considers that she "owns" the premises. The contracting Pilgrim Company does not try to tell her how to run her business, nor does it in fact run her business. She believes that as an independent businesswoman, she has built up the business and increased the volume by offering good service to customers.

Mrs. Smith also sells ties. She previously took in leather goods but her experience was unsatisfactory and she discontinued the practice. Her experience as to setting hours and prices of certain items, hiring help, responsibility for losses on checks and credit paralleled that of other witnesses.

21. Mrs. Torry Desoto Rountree, also under subpoena and called by plaintiff, had prior business experience in an auto parts store. She was trained as an employee of a substation prior to assuming a contract. Although she occasionally received suggestions from officials of her Pilgrim Company on running the business, she felt free to run her own business free from interference by the company. She stated that it is necessary to give good service to customers and to see that the contracting Pilgrim Company does a quality job of laundering and dry cleaning in order to operate a successful store. Mrs. Rountree was responsible for running the cash register; her manager never used the register. In other respects Mrs. Rountree's operation paralleled that of other witnesses.

22. Mrs. Maries McMahan, a witness for plaintiff, was an employee at a Pilgrim substation until 1970. She became aware of an opening "in a good location" for a contract operator. She expressed interest in obtaining the contract. She had previously operated a contract substation for one of the Pilgrim franchise companies, Bolton Enterprises. She stated that a contract operator must be able to treat customers in such a fashion that they will come back for repeat business, or to be a good salesman. She testified that the contracting Pilgrim Company exerted no control over her business. Her experience was similar to that of other witnesses.

23. Defendants treat employees who operate substations differently from contract operators, as evidenced by the operation of Pilgrim Laundry Company No. 11. Employees are paid by the hours. After six months of work, employees receive paid vacations, life and hospital insurance. Employees also receive five (5) paid holidays per year. Employees are docked for time off and receive no pay.

In company-operated substations, employees "break down" the cash register daily, sending all cash receipts, register tapes, and cleaning ticket stubs to the Pilgrim Company which maintains all records of transactions for such substation. Contract operators are required to remit only a specified amount of cash daily, plus the weekly accounting. They maintain their own records as to transactions, register tapes, and invoice stubs. Inventory is taken monthly at company operated substations. It is suggested that contract operators take inventory monthly but this is left to the operators' discretion. Pilgrim Company No. 11 fixes the hours of operation of its employee-operated stores. Contract operators set their own hours.

The manager of Pilgrim Company No. 11, Davis, closely supervises his employee-operated stores. If he decides a facility is untidy, he will order the employee to clean it, failing which he can discharge the employee. His approach to a contract operator is limited to a recommendation that the store be cleaned. His only sanction is termination of the contract at the end of the term.

Company-operated stores do not accept credit cards or extend credit. They do not sell ties or other such items. They do not accept leather goods, hats, gloves, or reweaving. Contract operators are free to do these things

and frequently do so. Company representatives freely enter company-operated stores after hours for various reasons; they do not enter contract operator stores after working hours.

24. The relationship of the individuals in question resulted from a choice by each to enter into the contract arrangement. Each operator who testified had previously operated a substation as an employee. When the opportunity arose to operate a store as a contract operator, each lady voluntarily chose that arrangement. In terms of "economic reality," they gave up the certainty of income as an employee, relinquished employee benefits such as paid hospitalization and life insurance, holidays, and other such accoutrements of employee status, and accepted the business risks of contract status. Each testified she made more money as a contract operator. Each was willing to take risks under the terms of the contract agreement and work toward building her business to achieve greater income. The fact that most contract operators have enjoyed a permanency of relationship under the lease arrangement does not mitigate against the "economic reality" of independent contractor status; rather, it confirms the fact that it has been a satisfactory arrangement to these ladies.

25. The respective Pilgrim Companies neither assume nor exercise control over the operations of the contract facilities. Each operator who testified clearly relished the idea that she was in charge of her own business enterprise, free from control by the contracting Pilgrim Company, and that the success of the business was dependent on her individual efforts and accomplishments.

26. Each individual operator has substantial opportunities for profit or loss, primarily dependent upon her

efforts and abilities to build up and develop a clientele. Their losses from bad checks, extension of credit, and employee theft were clearly documented. Although they may not experience negative incomes from the business, their income is certainly lower if they fail to operate the substations properly.

27. The investment in the inventory by each contract operator, while a modest one, is substantial when considered in view of the limited means of these individuals. Although there is no guarantee of a return of the investment, by custom and practice the subsequent operator pays the value of the inventory to the terminating operator.

28. The operation of a successful Pilgrim Company laundry and dry cleaning substation requires that the contract operator acquire a knowledge of the business, and become a "salesman" in terms of ability to attract and retain customers. Each witness attested to the necessity that operators develop a rapport with customers in terms of politeness, courtesy and attentiveness. Contract operators must give "personal" attention to customers, and must insure that Pilgrim performs quality cleaning and lanudering on the clothing. Each operator must possess some "business sense," and run an efficient store. Additionally, each operator must become proficient in maintaining records, handling money and checks, hiring and paying employees, and making such wage deductions as required by law. While these skills are not the equivalent of highly-trained persons in other occupations, these skills and qualities are equivalent to those required of other small independent merchants. With due regard to the type of business involved, it is clear from the evidence

that substantial willingness to take a business risk, skill, initiative, judgment, and foresight are required for success of the operation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this cause. 29 U.S.C. §217.

2. Defendants' business activities and operations constitute a single enterprise engaged in commerce within the meaning of Sections 3(r) and 3(s)(2) of the Act, 29 U.S.C. §§203(r), and 203(s)(2).

3. The Act defines "employ" to include "to suffer or permit to work." 29 U.S.C. §203(g). This definition and the Act's coverage are obviously broad and comprehensive. See *United States v. Rosenwasser,* 323 U.S. 360, 362 (1945). Existence *vel non* of an employment relationship is not determined by a single factor but by the economic circumstances of the whole activity. *Rutherford Corporation v. McComb,* 331 U.S 722 (1947); *Brennan v. Partida,* 492 F.2d 707 (5th Cir. 1974) and cases cited therein. An incomplete list of relevant factors includes degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required. *United States v. Silk,* 331 U.S. 704, 716 (1947).

On balance the realities of the Piligrim organization do not demonstrate an employment relationship with the contract operators. These operators are largely independent of their manager's control both in spirit and in fact. They make the majority of significant decisions as to the daily operation of their business. They deal on an equal basis with their respective managers. Each manager can

only suggest; he cannot direct the operator in her daily work. Rules and restrictions on the operators are contained in the written lease agreement. These instructions largely relate to uniform processing of clothes, accounting for moneys, and protection of the substation premises. Such uniformity is reasonably necessary to the efficient movement of clothing, modern accounting, and security of the company's investment. The provisions relating to the protection of the substation premises are common to leasing arrangements where there is no similar business relationship between lessor and lessee.

The opportunities for profit or loss are similar to those inherent in any independent merchandising effort. Although much depends on the location, other variables governing success are within the operator's control. Such factors are convenience of hours, extra services provided, and rapport with customers. Even prices and quality of cleaning are subject to the operator's control.

The individual's investment in the facility, although modest, is substantial from the individual's viewpoint. It is questionable if the Pilgrim Companies could attract sufficient operators if the initial investment were greater.

Many operators have enjoyed a long term relationship with the Pilgrim group. The record indicates considerable movement of operators, both within and among the Pilgrim Companies, and to and from other cleaning establishments. Thus the permanency of the continuing relationships with Pilgrim Companies evidences the contract operators' satisfaction with the Pilgrim Companies, rather than economic dependence upon them.

Operation of a cleaning substation does not require long training or highly developed skills. Within the limits

of the business, however, the contract operator position requires the fullest use of the individual's tolerance for risk taking, business sense, salesmanship, personality, judgment and efficiency.

Based on the evidence presented, and for the foregoing reasons, the Court concludes that the contract operators of the Pilgrim substations are not defendants' employees within the meaning of the Act and thus are not subject to the provisions of the Act.

The foregoing constitutes the Court's findings of fact and conclusions of law. FED R. CIV. P. 52. Any finding of fact which constitutes a conclusion of law is hereby adopted as such. Any conclusion of law which constitutes a finding of fact is hereby adopted as such.

The Clerk shall file this Memorandum and Order and furnish a copy to all counsel.

DONE at Houston, Texas, this 21st day of May, 1974.

/s/ JAMES NOEL
JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1975

NO. 74-2909

D. C. Docket No. CA 71-H-968

W. J. USERY, Secretary of Labor
United States Department of Labor,
Plaintiff-Appellant,

v.

PILGRIM EQUIPMENT COMPANY, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before WISDOM, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

March 3, 1976

Issued as Mandate: March 25, 1976

PERTINENT STATUTES

§ 201. Short title

This chapter may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, § 1, 52 Stat. 1060.

* * *

§ 202. Congressional finding and declaration of policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affect commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

§ 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

* * *

(f) "Agriculture" including farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

* * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise,

or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detri-

mental to their health or well being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

* * *

(n) "Resale", except as used in subsection (s) (1) of this section, shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

* * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more;

(2) any such enterprise which is engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated;

(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production

of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000.000.

(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

(5) any gasoline service establishment if the annual gross volume of sales of such establishment is not less than $250,000, exclusive of excise taxes at the retail level which are separately stated:

Provided, that an establishment shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce, or a part of an enterprise engaged in commerce or in the production of goods for commerce, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection, if the only employees of such establishment are the owner thereof or persons standing in the relationship of parent, spouse, or child of such owner.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of Title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(v) in the Library of Congress;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivisions, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivisions, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, or

(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

(3) For purposes of subsection (u) of this section, such term does not include any individual employed by

an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided,* That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further,* That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate except that the amount of the increase on account of tips determined by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to

any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided,* That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and service of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction or both;

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(5) is an activity of a public agency.

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection. The employees of an enterprise which is a public agency shall for purposes of this

subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

As amended Sept. 23, 1966, Pub. L. 89-601, Title I, §§ 101-103, Title II, § 215(a), 80 Stat. 830-832, 837; June 23, 1972, Pub. L. 92-318, Title IX, § 906(b)(2), (3), 86 Stat. 375; Apr. 8, 1974, Pub. L. 93-259, §§ 6(a), 13(e), 88 Stat. 58, 64.